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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

— No. 893

ARTHUR HOFFMAN,

Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.
"Respondents", and Plaintiffs below,

and

CHRYSLER CORPORATION, et al., and
PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 945, October Term 1964),
Objector below.

BRIEF OF RESPONDENTS JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION TO BRIEF OF SOL A. DANN IN SUPPORT OF PETITIONS FOR CERTIORARI

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Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 954, October Term 1964), Objector below.

BRIEF OF RESPONDENTS JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION TO BRIEF OF SOL A. DANN IN SUPPORT OF PETITIONS FOR CERTIORARI

Foreword

Sol A. Dann, a member of the Michigan bar and one of the original plaintiffs in the stockholders' derivative suit, settlement of which is sought to be reviewed herein, has filed a brief in support of the petitions for certiorari filed by stockholder petitioners Hoffman in No. 893, and Ezzes in No. 954. Unlike these petitioners Dann did not appeal from the decision of the Court of Chancery approving the settlement which he now attacks; and for this reason the Delaware Supreme Court held, following the established state practice, that he was not an appellant and

> "has no standing to argue in opposition to the judgment below (citing cases). The brief of the appellee Sol A. Dann is accordingly ordered struck from the record."
>
> (Appendix to Dann Brief, p. 75)

Dann does not seek in this Court to review, on federal grounds or otherwise, the decision of the Delaware Supreme Court denying him the status of an appellant. Instead, he takes advantage of his status as appellee in the state court, and respondent herein, to spread upon the records of this Court his former attacks upon the Courts below and all the attorneys who have met with his displeasure including his own law partner.

Dann agreed to the settlement of this case in the Delaware Court of Chancery. In his affidavit sworn to March 27, 1963, filed with the Court of Chancery, he stated as follows:

"62. Deponent's primary purpose, prior and subsequent to litigation has always been the protection of Chrysler and its stockholders. Deponent believes that the over-all benefits to Chrysler and its stockholders, resulting from the immediate termination of all litigation far outweighs any amounts, even though it be in untold millions, that could be recovered from the individual defendants. This is particularly true in deponent's opinion considering the change in management and the company's improved practices that have already doubled the value of Chrysler's stock in a healthy corporation with good future potentials, as compared to pre-existing conditions."

Therein he referred approvingly to the stipulation of settlement:

"65. The stipulation of settlement in this case specifically provided, on the top of page 4, the primary consideration for the settlement, namely: 'plaintiffs having considered, among other things, the significant and steady progress in all phases of Chrysler's operations under new management, believe settlement of the litigation on the terms herein agreed, with the estimated benefits which will flow to Chrysler and its stockholders by reason of the amendment to the Incentive Compensation Plan, can fairly be considered an achievement of the objectives of the litigation and is much to be preferred to a continuation of the litigation, and is in the best interests of Chrysler and its stockholders.'"

That language, written several weeks after the notice to the stockholders establishes that Dann unequivocally approved the settlement.

I.

The genesis of Dann's attacks is clear. He became incensed by certain unfavorable comments in the Chancellor's opinion approving the settlement, including, among other things, a reference to Dann's securing for himself a private benefit in the settlement (Appendix to Brief of Certain Defendants in No. 893, pp. 99-102). Cf. *Young* v. *Higbee Company,* 324 U.S. 204, 213. Accordingly, he sought to set aside the approval of the settlement and to reopen the record.

The Chancellor denied the application. Mr. Dann did not thereafter appeal from the decree approving the settlement or from the separate order of the Chancellor refusing to reopen the record (Appendix to Dann Br. pp. 44-45). Instead, he appeared in the Delaware Supreme Court as appellee and attempted to attack the settlement. That Court held that since he was an appellee and not an appellant he had no standing to attack the decision of the lower court. (Supra, p. 2). Likewise, he did not file a petition for certiorari but as respondent filed a late brief in support of the Hoffman and Ezzes petitions herein. His charges are not supported by any evidence in the record.

II.

The Court of Chancery and the Supreme Court have approved the settlement—but on grounds different from those desired by Dann.

Since those courts arrived at the very result Dann wished, how could there have been any violation of his rights even though the grounds of the decision were not pleasing to him?

For the sake of brevity, we refer here to only two of the many misstatements in the Dann brief. (1) At page 10 of his brief, he states that his counsel, "stipulated with the defendants without his knowledge or consent, not to take the depositions of any defendants until Dann's deposition was completed." By order dated February 23, 1961, over the objection of plaintiff's counsel, the Court of Chancery stayed all discovery; thereafter the Court, on its own motion, by orders dated May 16, 1961 and October 27, 1961, stayed all depositions. The plaintiffs had moved to take the depositions of certain defendants on February 21, 1961 but this was denied by the Court. (2) Dann's crude comment at page 18 of his brief concerning the reaction of plaintiff's counsel to the lower court's opinion is without foundation. The petition for reargument was filed not in the Court of Chancery, but in the Delaware Supreme Court, and on the insistence of Dann's law firm.

Questions Presented

The first question—"Did the stockholders' notice contain false and misleading statements, contrary to the S.E.C. regulations?"—raises only a question of fact. Both the Chancery Court and the Supreme Court of Delaware have decided there was no fraud in the proxy statement (Brief of Respondents Horvath et al. in reply to Ezzes Petition # 954, pp. 4, 5). This Court will not review a factual decision concurred in by the two courts below and uncontroverted by any evidence. No question of law, much less federal law, is presented.

The second question—"Were the stockholders deprived of equal protection, a fair and impartial hearing, and of their rights, liberties and property without due process of law?"—is not presented by the record. Dann's self-serving statements are not evidence.

The third question—"Is the Opinion of the Delaware Supreme Court erroneous and the product of a 'whitewash' settlement".—is likewise presented only by Dann's self-serving statements below.

Conclusion

For the reasons above set forth the petitions should be denied.

Respectfully submitted,

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